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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,)	
)	No. 40195
Plaintiff-Respondent,)	
)	Ada Co. Case No.
vs.)	CR-2011-8111
)	
JENNIFER ELAINE SHAW,)	
)	
Defendant-Appellant.)	

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA**

HONORABLE DEBORAH A. BAIL
District Judge

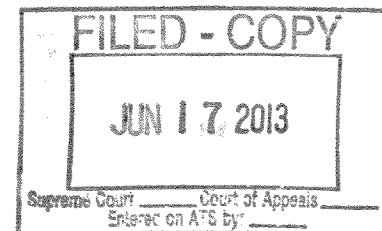
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STATEMENT OF THE CASE

Nature of the Case

Jennifer Elaine Shaw appeals from the judgment entered upon the jury verdict finding her guilty of possession of methamphetamine. On appeal, Shaw challenges the denial of her motion to suppress.

Statement of Facts and Course of Proceedings

On May 26, 2011, during a traffic stop, an officer arrested Shaw on an outstanding warrant and for driving with a suspended license. (R., p.99; Tr.,¹ p.6, L.12 – p.11, L.3.) After a drug detection dog exhibited behavior that its handler recognized as an alert on the exterior of Shaw's vehicle, officers searched the vehicle and found within a black purse several pill bottles, one of which contained methamphetamine. (R., pp.99-100; Tr., p.12, L.15 – p.14, L.15, p.29, L.10 – p.31, L.23, p.43, L.23 – p.45, L.1.)

The state charged Shaw with possession of methamphetamine. (R., pp.59-60.) Shaw moved to suppress the evidence against her, arguing, *inter alia*, that the drug detection dog did not actually alert on her vehicle and, even if it did, the alert was not sufficiently reliable to establish probable cause justifying the warrantless search. (R., pp.70-79; Tr., p.60, L.21 – p.57, L.7.) After a hearing, the district court denied Shaw's motion, concluding from the evidence

¹ The appellate record contains several separately bound volumes of reporter's transcript. All citations herein to "Tr." are to the transcript of the suppression hearing conducted on May 2, 2012.

presented that a reliable drug detection dog had alerted on Shaw's vehicle and, as such, the "warrantless search was constitutionally justifiable." (R., pp.99-101.)

The case proceeded to trial, and a jury found Shaw guilty as charged. (R., pp.102-04, 120.) The district court imposed a unified sentence of seven years, with three years fixed, and retained jurisdiction. (R., pp.137-39.) Shaw timely appealed from the judgment. (R., pp.133-36.)

ISSUES

Shaw states the issues on appeal as:

1. Whether the officers lacked probable cause to search the vehicle because the canine unit's behavior, considered in the totality of the circumstances, was not reliable so as to provide such probable cause.
2. Whether the warrantless search of the closed containers in the car was not justified under the inventory exception because the State did not prove that the search of those containers was conducted pursuant to established policy.

(Appellant's brief, p.6.)

The state rephrases the issue as:

Has Shaw failed to establish error in the denial of her suppression motion?

ARGUMENT

Shaw Has Failed To Establish Error In The Denial Of Her Suppression Motion

A. Introduction

Shaw challenges the denial of her motion to suppress, arguing as she did below that the drug detection dog did not alert on her vehicle and, even if it did, the alert was not sufficiently reliable to supply the officers with probable cause to justify the warrantless search of the vehicle.² (Appellant's brief, pp.7-12.) Shaw's arguments fail. The district court's finding that the drug detection dog alerted on Shaw's vehicle is supported by substantial evidence in the record. Moreover, correct application of law to the facts found by the district court shows the alert was sufficiently reliable to supply the officers with probable cause to believe there were drugs in the vehicle, thus justifying the search of the vehicle (and the containers therein) without a warrant.

B. Standard Of Review

The standard of review of a suppression motion is bifurcated. When a decision on a motion to suppress is challenged, the appellate court accepts the trial court's findings of fact that are supported by substantial evidence, but freely reviews the application of constitutional principles to those facts. State v.

² Shaw also argues that the "warrantless search of the closed containers in the car was not justified under the inventory exception." (Appellant's brief, p.12 (capitalization altered, underlining omitted).) Because, for the reasons set forth herein, the search of the vehicle was justified under the "automobile exception," this Court, like the district court, need not determine whether the evidence Shaw sought to suppress would have been inevitably discovered pursuant to an inventory search of her vehicle. (See R., p.101.)

Klingler, 143 Idaho 494, 496, 148 P.3d 1240, 1242 (2006). The credibility of the witnesses, the weight to be given to their testimony, and the inferences to be drawn from the evidence are all matters solely within the province of the district court. Peterson v. State, 139 Idaho 95, 97, 73 P.3d 108, 110 (Ct. App. 2003).

C. The District Court's Factual Findings

The district court made the following, largely uncontested,³ findings of fact based on the evidence presented at the suppression hearing:

On May 26, 2011, Corporal Terry Hodges of the Meridian Police Department observed a car driven by the defendant fail to signal a lane change so he stopped the car. The car was stopped in a lane of traffic near the curb with the driver's side door nearest the curb.

The defendant, who was the sole occupant, identified herself as "Jennifer Thornton." A quick check of law enforcement records revealed that "Jennifer Thornton" was an alias used by Jennifer Elaine Shaw. The same quick check revealed that there was an outstanding warrant for Jennifer Shaw for Failure to Obey a Citation and that she was driving with a suspended license. Ms. Shaw was arrested.

Cpl. Hodges asked for assistance which showed up in the form of a K-9 officer. The K-9 officer, Officer Dan Vogt, had his dog walk around the car. The car was a two door car with the windows down. The dog, Max, is a Malinois who is a trained drug detection dog who has been trained to spot heroin, cocaine, marijuana and methamphetamine.

Officer Vogt trained extensively with Max since they were assigned to work together in October, 2010 including forty hours a week for two months during initial training. Max was regularly and thoroughly trained after the initial intensive training and has given possibly one thousand alerts. Max has proven 100% accurate in

³ Shaw challenges the district court's ultimate factual finding that the drug detection dog alerted on her vehicle. (Appellant's brief, pp.9-10.) As explained in Section D.1., *infra*, however, the court's finding is supported by substantial evidence in the record.

detecting drug odors during his training. Max will alert to both drugs and residue remaining on objects that someone who has handled drugs has touched. He has alerted at least once in the past on masking tape used to secure a package of drugs even though human senses were unable to detect the residual presence of the drugs.

Malinois are a herding breed. Max signals his finds primarily in two ways: a very intense stare at his handler and by sitting. One obvious aspect of the extensive amount of time spent together by the dog and his handler is that the handler becomes very adept at reading the dog's signals.

Max signaled at the driver's door of Shaw's vehicle and at the gas cap lid on the driver's side of the car. When he signaled at the driver's door, he did so by a stare and an indication that he wanted inside the vehicle. Officer Vogt had him continue on the outside of the driver's side of the car, and Max tried, unsuccessfully, to sit immediately when he drew near the gas cap lid but, since he was by a grate near the curb, his hind legs fell into the grate and he lost his balance and scrambled onto the sidewalk. He gave a definite stare signal at both the driver's side door and at the gas cap lid. As noted above, the windows were open. Max did not enter the car because of the amount of stuff in the car. As a result of Max's alerts, the car was searched and a small amount of methamphetamine was located in a purse in a pill bottle.

(R., pp.99-100 (paragraph breaks added for ease of readability).)

D. The District Court Correctly Applied The Law To The Facts In Concluding The Search Of Shaw's Vehicle Was Justified By Probable Cause To Believe It Contained Contraband

The Fourth Amendment prohibits unreasonable searches and seizures. "A warrantless search is presumptively unreasonable unless it falls within certain special and well-delineated exceptions to the warrant requirement." State v. Kerley, 134 Idaho 870, 873, 11 P.3d 489, 492 (Ct. App. 2000) (citing Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971); see also State v. Ferreira, 133 Idaho 474, 479, 988 P.2d 700, 705 (Ct. App. 1999).) One such exception is the

“automobile exception,” which authorizes a warrantless search of a vehicle and the containers therein when there is probable cause to believe the vehicle contains contraband or evidence of criminal activity. California v. Acevedo, 500 U.S. 565, 572 (1991); United States v. Ross, 456 U.S. 798, 824-25 (1982); State v. Tucker, 132 Idaho 841, 842, 979 P.2d 1199, 1200 (1999); State v. Yeoumans, 144 Idaho 871, 873, 172 P.3d 1146, 1148 (Ct. App. 2007); State v. Gibson, 141 Idaho 277, 281, 108 P.3d 424, 428 (Ct. App. 2005). “Probable cause is established if the facts available to the officer at the time of the search would warrant a person of reasonable caution in the belief that the area or items to be searched contained contraband or evidence of a crime.” Yeoumans, 144 Idaho at 873, 172 P.3d at 1148 (citing Ross, 456 U.S. at 823; see also Florida v. Harris, ___ U.S. ___, 133 S.Ct. 1050, 1055 (2013). “[W]hen a reliable drug-detection dog indicates that a lawfully stopped automobile contains the odor of controlled substances, the officer has probable cause to believe that there are drugs in the automobile and may search it without a warrant.” Yeoumans, 144 Idaho at 873, 172 P.3d at 1148 (quoting Gibson, 141 Idaho at 281, 108 P.3d at 428); see also Tucker, 132 Idaho at 843, 979 P.2d at 1201.

Applying the above legal principles to the facts of this case, the district court concluded the warrantless search of Shaw’s vehicle was constitutionally permissible because it was preceded by an alert for the odor of narcotics by a reliable drug detection dog. (R., p.101.) Although Shaw argues otherwise, a review of the record and of the applicable law supports both the district court’s factual findings and its ultimate legal conclusion that the search of Shaw’s

vehicle was supported by probable cause to believe the vehicle contained contraband.

1. Shaw Has Failed To Show Clear Error In The District Court's Factual Finding That Max Alerted On Her Vehicle

As set forth in Section C, *supra*, the district court found that Officer Vogt's drug detection dog, Max, twice "signaled" (*i.e.*, alerted) on the exterior of Shaw's vehicle. (R., pp.99-100; see also R., p.101 ("Because of Max's alerts, there was probable cause to believe that the vehicle contained drugs and a warrantless search was constitutionally justifiable.")) Shaw challenges this factual finding as clearly erroneous, contending it was not based on substantial or competent evidence. (Appellant's brief, pp.9 n.7, 10.) Shaw is incorrect. A review of the evidence presented at the suppression hearing, particularly Officer Vogt's testimony, supports the district court's finding that Max "signaled" to the odor of narcotics both at the open driver's side window and at the gas cap lid on Shaw's vehicle.

Officer Vogt testified he has worked as a canine officer since October 2010. (Tr., p.19, L.23 – p.20, L.1..) He and Max trained together for approximately 320 hours over a two-month period and were certified as a team to detect a variety of controlled substances, including methamphetamine. (Tr., p.20, L.2 – p.22, L.20.) Since becoming certified, Officer Vogt and Max have engaged in weekly maintenance training. (Tr., p.27, L.24 – p.28, L.1.) They have also been deployed for drug detection in the field between 15-30 times per

month, with Max alerting to the presence of narcotic odors approximately 1000 times. (Tr., p.27, L.18 – p.28, L.5.)

Based on his training and experience with Max, Officer Vogt is able to recognize when Max alerts based on distinct changes in Max's behavior. (Tr., p.22, L.21 – p.24, L.18, p.35, L.4 – p.36, L.12.) Max does not just smell the drug odor and sit. (Tr., p.22, L.21 – p.23, L.3.) Rather, depending on environmental factors and how close he can get to the source of the odor, Max exhibits any number of behavioral changes – which may include “a tensioning in his body posture,” a snapping of his head, and the taking of “deep, closed-mouthed sniffs through his nose.” (Tr., p.23, Ls.1-24.) Officer Vogt testified that, “ultimately, [Max] ends up making eye contact with me after I see these body changes. And then, when he makes eye contact with me, ... most of the time he will sit.” (Tr., p.23, L.25 – p.24, L.3.) There have been occasions, however, when Max has detected the odor of narcotics but was unable to sit because his footing was poor – e.g., when he was inside a vehicle and had “his front feet down on the floorboard, [and] his back feet upon on a seat” or was “standing on the console, or part of the dash.” (Tr., p.24, Ls.4-13.) Officer Vogt testified that, on those occasions, “I don't get that final sit response. But I can tell, through his body language and through his ... physical cues that he's giving me, followed with that intense eye contact that he makes with me, that he's alerted to it, he's gotten as close to the source as he can” (Tr., p.24, Ls.12-18.)

Officer Vogt testified that, in this case, Max exhibited behavioral changes consistent with an alert to the odor of narcotics at two separate points while

sniffing the exterior of Shaw's vehicle. (Tr., p.29, L.15 – p.31, L.23, p.43, L.23 – p.45, L.1.) The first behavioral change occurred when Max neared the open driver's side window of the vehicle. (Tr., p.29, L.21 – p.30, L.19, p.44, Ls.1-4.) At that point, Max stopped walking and stared at Officer Vogt. (Tr., p.30, Ls.3-10, p.44, Ls.1-4.) Based on his training and experience with Max, Officer Vogt interpreted that behavior as an indication that Max "smell[ed] [a] narcotic odor that he wanted to get closer to." (Tr., p.30, Ls.11-17, p.44, Ls.14-16.) However, Max did not display "everything [the officer] wanted to see at that point, as far as to be able to say that it positively was an alert, with a final response" (Tr., p.44, Ls.16-21); so the officer redirected him to continue sniffing the exterior of the vehicle (Tr., p.30, Ls.18-21.) When Max reached the door to the gas tank, which was also on the driver's side of the vehicle, he "sniffed it with tense body posture," "took some deep sniffs at that gas door," and "made intense eye contact with" the officer. (Tr., p.30, L.21 – p.31, L.10.) Max then attempted to sit but was unable to do so because "his feet fell through the storm drain that he was standing on." (Tr., p.31, Ls.8-19.) Based on his training and experience with Max, Officer Vogt recognized Max's change in behavior at the gas door, coupled with his attempt to sit, "as an alert to narcotics odor." (Tr., p.31, Ls.21-23, p.44, L.22 – p.45, L.1.)

Officer Vogt's testimony clearly supports the district court's factual finding that Max twice "signaled" on the exterior of Shaw's vehicle. In arguing otherwise and contending, "the evidence is not clear that the dog was trying to alert at all" (Appellant's brief, p.10), Shaw merely substitutes her own interpretation of Max's

behavior for that of the officer who spent hundreds of hours training with Max, who has responded with Max on 15-30 drug detection deployments per month, who has personally witnessed Max alert approximately 1000 times in the field and who is otherwise uniquely qualified, as Max's assigned handler since October 2010, to recognize Max's alert behavior. That Shaw would not have interpreted Max's behavior, at either the driver's side window or the gas tank door, as an indication that Max smelled the odor of narcotics is irrelevant. Officer Vogt testified, unambiguously, that Max alerted at the gas tank door and also exhibited behavior consistent with an alert at the driver's side window. Shaw has therefore failed to show clear error in the district court's factual finding, based on Officer Vogt's testimony, that Max alerted on her vehicle.

2. Correct Application Of The Law To The Facts Found By The District Court Shows The Alert Was Sufficiently Reliable To Supply The Officers With Probable Cause To Believe There Were Drugs In The Vehicle

The Supreme Court of the United States has, very recently, articulated the appropriate test for determining whether an alert by a trained drug-detection dog is sufficiently reliable to provide the probable cause necessary to justify the warrantless search of a vehicle. See Florida v. Harris, ___ U.S. ___, 133 S.Ct. 1050 (2013). Like any other probable cause determination, "a finding of a drug-detection dog's reliability cannot depend on the State's satisfaction of multiple, independent evidentiary requirements." Id. at ___, 133 S.Ct. at 1056. Rather, "[a] sniff is up to snuff" when "all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person

think that a search would reveal contraband or evidence of a crime.” Id. at ____, 133 S.Ct. at 1058.

One good measurement of a drug detection dog’s reliability is its “satisfactory performance in a certification or training program.” Id. at ____, 133 S.Ct. at 1057. “If a bona fide organization has certified a dog after testing his reliability in a controlled setting, a court can presume (subject to any conflicting evidence offered) that the dog’s alert provides probable cause to search.” Id. A defendant may challenge a dog’s general reliability in a number of ways, including by contesting the adequacy of the training or certification program, examining how the dog or handler performed in the program, or offering evidence of the dog’s or handler’s previous performance in the field.⁴ Id. “Even assuming a dog is generally reliable, circumstances surrounding a particular alert may undermine the case for probable cause” – *e.g.*, if the handler “cued the dog (consciously or not), or if the team was working under unfamiliar conditions.” Id. at ____, 133 S.Ct. at 1057-58. If a defendant does “challenge[] the State’s case (by disputing the reliability of the dog overall or of a particular alert),” the court must “weigh the competing evidence” and determine whether, under all the circumstances, the dog’s alert “would make a reasonably prudent person think

⁴ The Harris Court observed, however, that, in most cases, field performance is not an accurate measure of a dog’s reliability. Harris, __ U.S. at ____, 133 S.Ct. at 1056-57 (footnote omitted) (observing that field data will usually not reflect a dog’s false negatives and “may markedly overstate a dog’s real false positives” because, in many instances, the “dog may not have made a mistake at all” but “may have detected substances that were too well hidden or present in quantities too small for the officer to locate,” or “may have smelled the residual odor of drugs previously in the vehicle or on the driver’s person”).

that a search would reveal contraband or evidence of a crime.” Id. at ____, 133 S.Ct. at 1058.

Application of these legal principles to the facts found by the district court in this case shows Max’s alert was sufficiently reliable to supply the officers with probable cause to believe there were drugs in Shaw’s vehicle. The district court made the following uncontested factual findings with regard to Max’s training record:

Officer Vogt trained extensively with Max since they were assigned to work together in October, 2010 including forty hours a week for two months during the initial training. Max was regularly and thoroughly trained after the initial intrusive training and has given possibly one thousand alerts. Max has proven 100% accurate in detecting drug odors during his training.

(R., p.100.) “Viewed alone, that training record ... sufficed to establish [Max’s] reliability.” Harris, __ U.S. at ____, 133 S.Ct. at 1058. And, contrary to Shaw’s assertions on appeal, nothing about the “particular circumstances of this case” or Max’s record in the field served to undermine the presumption of reliability established by Max’s certification and record of satisfactory performance in controlled settings.

As she did below, Shaw contends on appeal that Max’s alert was not reliable because “the dog did not alert where any odor emanating from the vehicle was likely to be the strongest: the open front window” and, instead, alerted at the back of the vehicle, despite a tail-wind and despite the fact that no drugs were actually found at the back of the car. (Appellant’s brief, pp.9-10.) As found by the district court, however, Max *did* “signal” at the open front window in a manner that indicated to his handler that he smelled the odor of a controlled

substance. (R., p.100; see also Tr., p.30, Ls.3-19, p.44, Ls.1-21.) While Max did not give or attempt to give a “final sit response” at the open front window, his behavior there – nearest to where the drugs were actually found – only added to, not detracted from, the totality of the circumstances supporting his reliability.

Moreover, that Max ultimately alerted at the back of the car, where the wind was blowing forward and no drugs were found – does not demonstrate the alert was unreliable. Officer Vogt testified, and the district court found, that Max was trained to detect the odor of controlled substances, not the controlled substances themselves, and, as such, may have been responding to residual drug odors. (R., p.100; Tr., p.36, L.13 – p.45, L.3 – p.47, L.11.) As noted by the Supreme Court in Harris, “[a] well-trained drug-detection dog *should* alert to such odors; his response to them might appear a mistake, but in fact is not.” Harris, ___ U.S. at ___, 133 S.Ct. at 1059 (emphasis original) (citing footnote 2 of the opinion in which the Court explained: “A detection dog recognizes an odor, not a drug, and should alert whenever the scent is present, even if the substance is gone”). It does not matter that, in hindsight, no drugs were located at or near the gas tank lid; where, as here, a well-trained dog alerts on a location such alert “establishes a fair probability – all that is required for probable cause – that either drugs or evidence of a drug crime ... will be found.” Id. at 1056-57 n.2

In an attempt to discredit Max’s reliability in general, Shaw points to Max’s record of accuracy in the field, noting Officer Vogt’s testimony that Max alerts “fairly frequently” when drugs are not present. (Appellant’s brief, p.11 (citing Tr., p.36, L.24 – p.37, L.2).) Because, as explained above, drug detection dogs are

trained to detect the odor of controlled substances, not the controlled substances themselves, the Supreme Court has determined that records of a dog's field performance are of "relatively limited import" in determining the dog's reliability. Id. at ___, 133 S.Ct. at 1056-57. Instead, the "better measure of a dog's reliability ... comes away from the field, in controlled testing environments" where the "designers of an assessment know where drugs are hidden and where they are not – and so where a dog should alert and where he should not." Id. at ___, 133 S.Ct. at 1057. Here, Officer Vogt testified, and the district court found, that Max has a 100% accuracy record in his training and certification assessments. (R., p.100, Tr., p.37, Ls.11-17.) Given that record, Max enjoys a presumption of reliability. Id.

In a final attempt to discredit Max's reliability, Shaw contests the adequacy of his training. Specifically, she contends "there is no evidence that suggests Max was trained to do anything except sniff where Officer Vogt directed him to sniff and then look to the officer to get his reward." (Appellant's brief, p.11.) To support this assertion, Shaw cites only the portion of the transcript wherein Officer Vogt testified Max was initially trained to detect the odor of controlled substances in scent boxes. She completely ignores the officer's subsequent testimony that, after the dogs, including Max, got "used to being exposed to the odor on that box," the handlers "move[d] the odors" to different locations – such as buildings, vehicles, trees, etc. – "to expose the dogs to any type of scenario that we could come up with to *where they have to search and find narcotic odors.*" (Tr., p.22, Ls.8-15 (emphasis added).) Shaw has failed to demonstrate

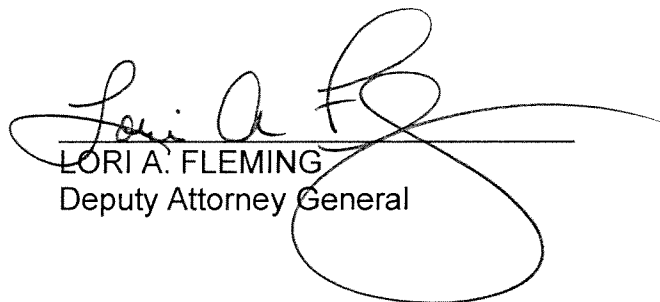
from the record any deficiency in Max's training and certification or his ability, without being cued, to reliably detect the odor of controlled substances.

Because Max's training record established his reliability in detecting the odor of controlled substances, and because Shaw failed to identify any evidence either below or on appeal that would undermine that reliability, the district court correctly concluded that Max's alert provided the officers with probable cause to search Shaw's vehicle. See Harris, ___ U.S. at ___, 133 S.Ct. at 1059. Shaw has failed to establish any basis for reversal of the denial of her suppression motion.

CONCLUSION

The state respectfully requests this Court to affirm the judgment and the district court's order denying Shaw's motion to suppress.

DATED this 17th day of June 2013.

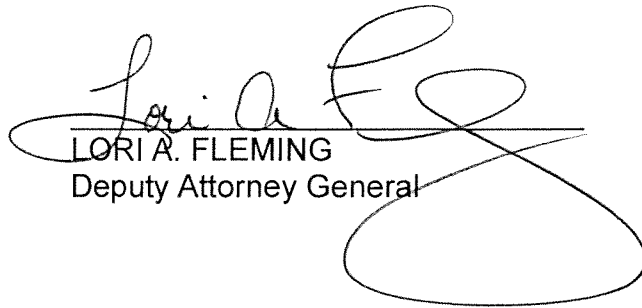

LORI A. FLEMING
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 17th day of June 2013, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

BRIAN R. DICKSON
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.


LORI A. FLEMING
Deputy Attorney General

LAF/pm